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ALEXANDER L. STEVAS,

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH W. SMITH, JR.
1786 S.W. Greenway Circle
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Pro Per

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET NO. 9724-76
9725-76

MEMORANDUM SUR ORDER

On August 1, 1978, respondent submitted to the Court a computation of petitioner's Federal income tax deficiencies for the 1973 and 1974 taxable years pursuant to the decision of the Court on June 20, 1978. At that hearing, there appeared to be no disagreement between the parties concerning respondent's computation of petitioner's income tax for both years. For the reasons thus set forth in the transcript, the Court finds:

(1) An overpayment is due to petitioner for the 1973 taxable year in the amount of $360.36.

An addition to tax is due from petitioner for the 1973 taxable year under section 6653(a) Int. Rev. Code of 1954, in the amount of $61.91.

(2) A statutory deficiency in income tax is due from petitioner for the 1974 taxable year in the amount of $640.96. No addition to tax is due from petitioner for the 1974 taxable year under the provisions of section 6653(a), Int. Rev. Code of 1954.

Appropriate decisions will be entered.

WILLIAM H. QUEALY
Judge

Dated: Washington, D.C.
September 22, 1978

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9725-76

DECISION

For reasons stated in the Memorandum Sur Order issued September 22, 1978, in this case, it is

ORDERED and DECIDED that there is a statutory deficiency in income tax due from petitioner for the 1974 taxable year in the amount of $640.96.

There is no addition to tax due from petitioner for the taxable year 1974 under the provisions of Section 6653(a), Int. Rev. Code of 1954.

WILLIAM H. QUEALY
Judge

ENTERED: September 26, 1978

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 9724-76

DECISION

For reasons stated in the Memorandum Sur Order issued September 22, 1978, in this case, it is

ORDERED and DECIDED that there is an overpayment due to petitioner for the 1973 taxable year in the amount of $360.36.

That there is an addition to tax due from petitioner for the 1973 taxable year pursuant to Section 6653(a), Int. Rev. Code of 1954, as amended, in the amount of $61.91.

WILLIAM H. QUEALY
Judge

Entered: September 26, 1978

From the Transcript of Proceeding Before the United States Tax Court June 19, 1978:

Respondent's amendment to the assessment was received as filed, the Court claiming no jurisdiction over the self-employment tax portion of the assessmet, that part of it being left in place and not appealable before the Tax Court(p.3,4 transcript)

The Court ruled the 1973 tax liability would be paid in full. (p. 9 transcript)

The Court ruled there was nothing illegal in respondent's handling of petitioner's taxes. When petitioner's wife filed a separate return, this entitled respondent to go to her for the records. It was not necessary to audit petitioner. As to the re-examination of the 1973 records, the Court: "that is neither here nor there." (this is petitioner's presumption) (p. 15, 16 transcript)

The Court ruled petitioner's 1974 return would be treated as a separate return. (p. 19 transcript)

As to the "improper assessment", the Court: "I don't know how you expect anybody to try a case in this posture." (This remark to respondent) (p. 23 transcript)

On petitioner's question of the assessment being held void, the Court: "But it isn't void . . . It may be too high, it may be too low and so forth . . ."(p. 27 transcript)

From the Transcript of Proceeding on June 20, 1978:

On petitioner's statement that neither the District Court nor the Tax Court claimed jurisdiction over the "improper assessment", the Court: "Actually, when you file a petition with this Court, the collection of the amount in dispute is automatically suspended, . . . with the proceeding in this court . . . But that only applies to certain types of taxes. . . The so-called 'mathematical error' is not subject to appeal in this Court, but if it's not a mathematical error, you can go ahead and challenge the right to

make the assessment in the District Court, I assume." (p. 42,43 transcript)

As to the negligence penalty for 1974, the Court: "I'm not going to give the negligence penalty because I think that somebody's been negligent on the other side here, too. There's too much confusion here." (p.46 transcript)

As to the neglignece penalty for 1973, the Court allowed the penalty because petition took an arbitrary credit against the tax. "It shows a wilfull disregard for rules and regulations." (p.47 transcript)

From the Transcript of Proceeding on August 1, 1978:

As to petitioner's objection to respondent's computation, which took into account petitioner's overpayment of 1975 taxes and his refund due from 1976, tax years not before the Tax Court, the Court allowed the 1975 overpayment to be credited to petitioner's 1974 tax liability and the 1976

refund to be credited to petitioner's 1973 tax liability.

As to petitioner's question on a 1975 tax refund due, the Court: "Well, we don't have that before us."

As to petitioner's question of why a 1975 tax overpayment and a 1976 tax refund were considered in the Court's findings, but a 1975 tax refund was not before the court, the Court: "The respondent has the obligation to credit any overpayment against the deficiency."

As to respondent's acknowledgement that there was a 1975 tax refund due petitioner, the Court: "Well, what happened to it?
Respondent: "It should be applied to his account. He (petitioner) should be receiving the refund."
The Court: "and he'll get a refund then?"
Respondent: "Yes, Your Honor."
The Court: "In dollars - - not applied to this account?
Respondent: "Well, I suppose the excess,

whatever may be outstanding, would be applied.

The Court: In other words, this will be used to pay the amount?

Respondent: "I would assume so, Your Honor, yes."

The Court: "Right. So that's your answer, Mr. Smith."

Petitioner: "I don't have an answer."

The Court: "Well, that's the only answer I can give you."

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9725-76

ORDER

This case was called from the calendar for the Motions Session of the Court at Washington, D.C. on November 23, 1977 for hearing on petitioner's motion to dismiss, filed October 20, 1977. There was no appearance by or on behalf of the petitioner. Counsel for respondent was heard on the motion. After due consideration, and for cause appearing in the transcript of the proceedings, it is ORDERED that petitioner's motion to dismiss is denied.

RANDOLPH F. CALDWELL, JR.
Special Trial Judge

Dated: Washington, D.C.
November 23, 1977

From the Transcript of Proceeding on November 23, 1977

(From pages 3-5)

Respondent: ". . . petitioner neither computed the self-employment tax nor carried a self-employment tax figure over to page 2 for entry on line 55 where he would otherwise show a computation of his tax liability. He entered a regular income tax figure on line 16 Form 1040, on page 1 of $429, based upon his computation from page 2 with itemized deductions and exemptions taken out. Although line 17 is available to show the total of tax credits, he did not claim a credit on that line. Neither did he add any total from page 2 of other taxes for the total of self-employment tax. However, on line 23, petitioner took a credit of the $429 which he had just shown as his stated liability, and he entered a figure of zero tax owed as a 'balance due IRS'. The result of this gamesmanship for the year 1974 posed a problem for the Service Center

clerk who processed that return. By entering three separate times the net earnings from self-employment, the clerk logically concluded petitioner erred in computing . . . and made a mathematical error in quotes, adjustment to the return. This conclusion was made, not withstanding, the following statement that was handwritten across the Schedule SE" 'This program is a fraud - - unconstitutional extortion, taking and giving nothing in return'. However, petitioner did not say on that schedule that he was not liable for the self-employment tax. (He said it in an attached schedule) The clerk processing the 1974 return did not have the benefit of the 1973 return and concluded that this was in effect a mathematical error. The $429 credit for regular income tax on page 1 of the return was supported by a typed page of frivolous constitutional protestations attached to the return. The clerk processing the return inadvertently considered the $429 credit to be a mathematical error. Contrary

to the treatment of the 20 percent credit, on the 1973 return which was not considered as a mathematical error by the Service, within the meaning of Code Section 6213(b)(1). Accordingly, an assessment was made for both the $429 credit of total tax liability that was shown on the return, plus the $1005.34 self-employment tax which was not carried over to be shown on page 2 and page 1 of Form 1040 as it should have been. Needless tosay, the $429 credit should have been treated as it was in 1973 as a protested amount and no assessment should have been made for that amount. However, respondent believes a reasonably prudent clerk in the Service Center has every right to conclude that the petitioner had made a mathematical error within the meaning of Code Section 6213(b)(1) in not computing the tax due from the self-employment income stated three separate times on Schedule SE.

(From page 5 of transcript)

THE COURT:" . . . the matter that Mr. Smith is complaining about probably does present a judicial issue that this Court could pass upon, and should pass upon, if it is properly raised. and, I think the way to raise that is to allow Mr. Smith to file an amendment to his petition to say that the Respondent erred . . ."

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDMENT TO PETITION

Assignment of Errors:

(1) The Notice of Deficiency did not indicate the correct alleged tax in question.

(2) Respondent's mathematical computations and billing are incorrect on the Service Center Assessment

(3) Respondent violated the Int. Rev. Code of 1954, Sec. 6213(a) providing in relevant part that no assessment of a deficiency and

no collection activity with regard to a deficiency in Federal Income Taxes determined by the Service shall be made until the decision of the Tax Court.

(4) Respondent violated Amendment V of the U.S. Constitution, the Due Process Clause, through the misapplication of the provisions of Section 6213 (b)(2).

(6) Respondent treated Petitiioner's joint return as a separate return with no authority.

(7) Respondent violated the provision of the Privacy Act of 1974 with respect to the auditing and collection procedures used in Petitioner's case.

(8) Respondent violated established Int. Rev. Service policy with respect to petitioner's move to another geographical location as related to IRS audits.

Wherefore, it is prayed that any and all assessed and already collected taxes for

1974 be returned to petitioner with interest; and further, that additional opérating loss refunds applied for in April 1977 by petitioner, and now being "investigated" by respondent, for no explained reason, be promptly returned to petitioner with interest.

JOSEPH W. SMITH, JR.

Date Filed: May 22, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSEPH W. SMITH, JR.,
individually, Plaintiff,

vs.

DIRECTOR OF INTERNAL REVENUE, et al.,
Defendant.

Docket No. 77-8119-Civ-CF

(filed July 28, 1977)

O R D E R

This cause came before the Court on defendant's motion to dismiss.

On plaintiff's 1973 and 1974 income tax returns, plaintiff did not pay self-employment taxes and refused to use the government's formula for determining his capital gains tax. Plaintiff indicated that he intended to challenge the constitutionality of the self-employment and capital gains tax. The Internal Revenue Service has filed notices of deficiency for 1973 and 1974. Thereafter, the plaintiff petitioned the United States Tax Court for review, where

the case is now pending. Plaintiff has commenced this present action for a refund of plaintiff's overpayment of 1975 taxes.

Where there is an overpayment of any internal revenue tax, Section 6402(a) of the 1954 Code provides that such overpayment, including any interest allowed thereon, may be credited against "any liability in respect of an internal revenue tax on the part of the person who made the overpayment." 26 U.S.C. section 6402(a); 10 Mertens on the Law of Federal Income Taxation section 58.38 (1976). The Internal Revenue Service has applied the 1975 overpayment against plaintiff's tax deficiencies for 1973 and 1974, pursuant to its authority. Since the overpayment on plaintiff's 1975 income tax return was fully allowed as a credit on plaintiff's 1973 and 1974 tax liabilities, the plaintiff has not stated a claim for a refund.
(See App. 60)

Plaintiff's tax liabilities for 1973 and 1974 are now pending before the tax court. If the tax court rules in favor of the taxpayer regarding the controversy of his 1973 and 1974 tax obligations, the taxpayer may then perfect his claim for a refund of the overpayment of his 1975 taxes and invoke the jurisdiction of this Court. It is thereupon

ORDERED and ADJUDGED that his Complaint be and the same is hereby dismissed without prejudice.

DONE and ORDERED at West Palm Beach, Florida, this 28th day of July, 1977.

CHARLES B. FULTON
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSEPH W. SMITH, JR.,
individually, Plaintiff,

vs.

DIRECTOR OF INTERNAL REVENUE, et al.,
Defendant.

Docket No. 77-8119-Civ-CF
(filed October 21, 1977)

O R D E R

The Court is in receipt of a letter from the plaintiff which is construed to be a motion for reconsideration.

The Court's Order of dismissal explained the reasons therefore. Immediately upon the receipt of the dismissal Order, the plaintiff was priveleged to seek appellate review, which apparently was not done. Although this plaintiff is proceeding pro se, his scathing and vituperative criticism of the Court's Order of dismissal of the cause requires no response other than reference to the reasons that were set out in that Order. It is thereupon

ORDERED and ADJUDGED that plaintiff's letter - motion for reconsideration is denied.

DONE and ORDERED at West Palm Beach, Florida, the 21 st day of October, 1977.

CHARLES B. FULTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Docket No. Civil No. 78-129

FINDINGS AND RECOMMENDATION

After the Internal Revenue Service (IRS) assessed the plaintiff for deficient payment of income taxes in 1973 and 1974, plaintiff filed an action in the United States Court challenging the assessment. He also claimed the right to have income tax overpayments for the year 1975 refunded. It is unclear whether the Tax Court action is still pending. Since plaintiff filed the Tax Court action, the IRS has found that plaintiff did overpay his 1975 income taxes, and it has credited the overpayment to the alleged deficiencies. In this action, plaintiff seeks a declaration that (1) the assess- . . . . . .

ment and collection of any and all of plaintiff's 1973 and 1974 income taxes are illegal prior to a pending hearing in the Tax Court, and (2) all refunds applied for by plaintiff on his 1975 and 1976 income taxes, which have been in part credited to his alleged tax liabilities, are refundable without further delay.

Plaintiff filed a substantially similar action in the United States District Court for the Southern District of Florida which was dismissed by Judge Fulton on July 28, 1977, for failure to state a claim upon which relief may be granted. Judge Fulton found that since the IRS applied plaintiff's 1975 overpayments to his 1973 and 1974 deficiencies, plaintiff was precluded from seeding a refund of the overpayments until such time as the Tax Court found that the IRS was incorrect in finding that plaintiff was deficient in his income tax payments for 1973 and 1974. The government has moved to dismiss this action contending that

the complaint fails to state a claim upon which relief may be granted and the court lacks subject matter jurisdiction.

The complaint does fail to state a claim upon which relief may be granted. This court cannot give declaratory judgments in tax matters. 28 U.S.C. Section 2201 Handeland v. C.E.R. 519 F. 2d 327, 329 (9th Cir. 1975). Therefore, this court cannot give the plaintiff the declaratory relief he seeks. In addition, as to the 1975 overpayment, plaintiff has not stated a claim because, as Judge Fulton found, the IRS has applied that overpayment to plaintiff's 1973 and 1974 tax deficiencies. 26 U.S.C. Section 6402(a). Plaintiff would not have a claim for return of the overpayment until such time as the tax Court determines that the IRS was incorrect in finding the deficiencies. Moreover, Judge Fulton's order should bar plaintiff, as a matter of res judicata, from litigating the question of whether the overpayment is returnable at

this time.

This Court has no subject matter jurisdiction over plaintiff's challenge to the IRS's deficiency assessment. Plaintiff has not paid the full amount of the alleged deficiency. A taxpayer must pay the full amount of an income tax dificiency assessed by the IRS before he may challenge its correctness in a suit brought in a federal district court. Flora v. United States, 357 U.S. 63 (1938). He is free to litigate in the Tax Court without advance payment. Flora, supra at 75.

This Court is without subject matter jurisdiction for yet another reason. Plaintiff has filed a petition in the Tax Court challenging the IRS assessment. The filing of a petition in the Tax Court gives that court exclusive jurisdiction. 26 U.S.C. section 6512(a); Dorl v. C.I.R., 507 F. 2d 406,407 (2d Cir. 1974).

Accordingly, defendant's motion to dismiss should be granted.

Dated this day of July, 1978

GEORGE E. JUBA
United States Magistrate

Petitioner's Note -

The Courts findings are each and every one after the fact of:

(1) a fraudulent assessment to which there were illegal credits/freezing of petitioner's overpayments and refunds.

(2)a tax enjoined from collection by petitioner's pending Tax Court case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 78-129

O R D E R

I have made a de novo review of those portions of the Magistrate's findings and recommendation to which objection has been made. The findings and recommendation are affirmed and the action will be dismissed.

Dated: December 4, 1978

ROBERT BELLONI
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 78-129

JUDGMENT

This action is dismissed.

Dated: December 4, 1978

ROBERT BELLONI
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 78-129

ORDER

On July 27, 1978, Magistrate Juba made findings and recommendation that defendant's motion to dismiss be granted.

On August 2, 1978, plaintiff filed a memorandum on the findings and recommendation. The defendant, on August 28, 1978, filed a memorandum supporting the findings and recommendation. On August 2, 1978, plaintiff filed an addendum to his memorandum. On September 5, 1978, plaintiff filed a second addendum.

On December 5, 1978, I filed an order affirming the magistrate's findings and re-

commendation. Judgment dismissing this action was filed December 5, 1978.

On December 8, 1978, plaintiff filed a motion for reconsideration of findings and opinion of the Court and alternatively for a more definite statement of opinion. The case in this court is now final.

Defendant's motion, filed December 8, 1978, is denied.

Dated: December 12, 1978.

ROBERT BELLONI

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH W. SMITH, JR.,
Petitioner-Appellant,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a decision of the
United States Tax Court

Submitted December 8, 1980
Decided December 23, 1980

Docket No. 79-7039

MEMORANDUM

Before: GOODWIN, SNEED and REINHARDT,
Circuit Judges

Despite the fact that the amount of taxes owed by the taxpayer may well be less than the amount the United States must spend to collect that amount, this is a case in which the excess should be expended to validate once more the legitimacy of the federal income tax.

Appellant Smith was found by the Tax Court to owe $690.96 with respect to the 1974 tax year and $61.91 with respect to 1973. We affirm the Tax Court's judgment. Smith raises numerous issues in this appeal with which we will deal quite briefly. None are meritorious.

1. Smith alleges that the income tax laws violate the Due Process Clause of the Fifth Amendment. This is not so. See Brushaber v. Union Pacific R.R. 240 U.S. 1, 24-25 (1916). This is an issue settled long ago.

2. Smith contends the Tax Court denied him a hearing on his due process claim. Smith is in error; the Tax Court heard him and rejected his claims.

3. Smith insists that the Commissioner violated 26 U.S.C. Section 7605(b). There is no evidence to support this claim in the record and it does not appear to have been

raised in the Tax Court.

4. Smith complains about the Commissioner's erroneous assessment. This was abated prior to trial and thus caused no injury to Smith. Corrected miscalculations by our creditors are annoyances but not legally cognizable injuries normally.

5. Smith complains about the completion of the self-Employment Schedule by the Revenue Service. However, the Service did no wrong. Smith owed the tax and does not show that any mathematical error exists. No right of Smith was violated.

6. Smith asserts the Tax Court erred infinding that he and his wife did not file a joint return in 1974. We have examined the record and hold that the Tax Court finding is proper.

7. The legality of the 1975 5ax overpayment was decided against Smith in Smith

v. Director of Internal Revenue, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977), and is now barred by res judicata.

8. Smith's complaints regarding his 1976 return were not before the Tax Court and will not be considered here.

9. Smith contends that the Tax Court wrongfully imposed the 5% negligence penalty. We disagree. Under the circumstances of this case the penalty was proper.

Affirmed.

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 9724-76, 9725-76

RESPONDENT'S ANSWERS TO PETITIONER'S INTERROGATORIES

THE RESPONDENT, in response to the interrogatories served by petitioner on or about March 20, 1978, answers as follows:

Attached hereto and identified as Exhibit B is a true and correct copy of petitioner's transcript of account for the year 1973. The transcript reflects that $1695.40 is presently (as of October 19, 1977) being held in that account. The $1,695.40 represents a tentative carryback allowance from petitioner's 1976 income tax return. Respondent is informed that such amount is being held in the 1973 account because of a "freeze" on petitioner's accounts brought about by

the Tax Court actions. Respondent is also informed that the "freeze" of a taxpayer's accounts is routine when there is litigation pending involving a taxpayer's account. Respondent does not know of other monies being witheld from petitioner, but if there is, it is respondent's understanding that the reason for such witholding is the "freeze" brought about by the Tax Court litigation.

STUART E. SEIGEL
Chief Counsel
Internal Revenue Service

Dated: April 10, 1978

By: JOHN D. PICCO
ASSISTANT REGIONAL COUNSEL

1500 S.W. First Ave.
810 Crown Plaza
Portland, Oregon 97201
Tel. No. (503) 221-3185

INTERNAL REVENUE SERVICE CENTER

Southwest Region
P.O. Box 937
Austin, Texas 78767

September 6, 1974

Mr. Joe W. Smith, Jr.
Rt. 1, Box 73AB
Lewisville, Taxas 75067

Dear Mr. Smith:

I am glad to respond to your letter of August 19 addressed to me and your letter of July 12 addressed to Attorney General William B. Saxbe, which has been passed along to me for reply.

You asked if the Congress has the right to tax any amount of personal income tax up to 100%, with no limitations.

The 16th amendment to the Constitution, which was passed by Congress in 1909 and finally ratified by three-fourths of the States in 1913, provides: . . . . . .

This amendment, which has been upheld by the

Supreme Court, makes no mention of limitations, so I assume that Congress has the power to tax total income at a given level. It has never done so. I doubt if it ever will.

You also ask why the Federal Government finds it necessary to redistribute income. Mr. Smith, I'm sure you know that the matter of spending authority is a responsibility of the Congress. Many factors influence the budget. Congress spends countless hours studying and debating the spending program, so I would certainly be less than honest if I tried to explain the merit and justification for the many spending programs included in the Federal budget.[1]

. . . . As a final note, I must point out that there is no legal authority for anyone to withold payment of a portion of their taxes on the basis of disagreement with the expenditure of Federal funds. The Internal Revenue

1 - Why is he not willing to let the courts determine the issues petitioner petitioned the courts to to determine.

Service will be required to examine and assess any such amounts that you might have withheld or deducted from your tax returns. A representative of the District Director's office in Dallas will likely contact you in the near future to review your prior year returns.[1]

Sincerely,

ERVIN B. OSBORN
Director

INTERNAL REVENUE SERVICE

1100 Commerce St.
Dallas, Tex. 75202

June 18, 1975

HONORABLE LAWTON CHILES
United States Senate
Washington, D.C. 20510

Dear Senator Chiles:

Mr. and Mrs. Joe W. Smith, Jr. filed a joint Federal income tax return for 1973. This return was signed by both taxpayers. The amount of income tax owed was computed correctly on the return; however, the taxpayers deducted 20% from the total tax due because

1 - Field Auditor John Lackey examined petitioner's 1973 tax year records in Oct. 1974.

they felt that approximately this amount of their tax money would be spent by the Federal Govenment on social reform and other programs which they did not support.

Their return was assigned to an Internal Revenue agent for examination. The agent worked with Mr. Smith until the examination was almost complete.[1] At this point, Mr. Smith decided to leave the Dallas area and move to Florida. Since Mrs. Smith filed a joint return with her husband and has all of their records in her possession, the revenue agent did not violate any Internal Revenue policy or Internal Revenue law in completing the examination with Mrs. Smith.

After the agent's report has been reviewed for completeness, the taxpayers will be offered a conference either in Dallas or Miami, Florida to attempt to reach a satisfactory agreement on whether or not the 20% deduction is legal.

1 The original examination was in Oct. 1974. Respondent requested a re-examination on Mar. 20, 1975.

If you desire any additional information on this case, please advise.

Sincerely yours,

A.W. McCanless
District Director

INTERNAL REVENUE SERVICE

701 Clematis Street
West Palm Beach, Fla. 33401

June 4, 1976

Joseph W. Jr. & Doris M. Smith
P.O. Box 1621
West Palm Beach, Fla. 33402

Dear Mr. Smith:

This letter is regarding our conversation on May 28, 1976, about your desire to petition Tax Court. I have been in contact with Philip Talbot, Chief of Conference in Dallas, and Dan Eberstein, Chief of Conference in Jacksonville.

Your audit files will be transferred from Dallas, and our district will issue Statutory Notices of Deficiency per your request. These notices will reflect the audit adjustments only, not the adjustment due to a

correction notice sent to you when you filed your 1974 return. When you receive the Statutory Notices of Deficiency, you will have 90 days to petition Tax Court.

The collection action on the $1382.99 tax due (plus penalties and interest) on your 1974 account will have to proceed, because it was generated by a correction notice from the Service Center, not an audit adjustment. The Service Center notified you that you had failed to transfer an income figure from a schedule to the face of the return. The collection action will proceed even if you include an argument about the Service Center correction notice in your petition to Tax Court.[1] A Revenue Officer from our office will be in touch with you about the 1974 bill due.

Very truly yours,

CAROL KNAPP
Office Audit Group
Manager

c.c. Route 1, Box 73AB
Lewisville, Texas 75067

1 - Refer to respondent's "Statement of Circumstances App. 45

VERBATIM COPIES OF HAND WRITTEN IRS OFFICE MEMORANDA WRITTEN BY FIELD AUDITOR JOHN LACKEY, DALLAS AUDIT DIVISION

Note of March 20, 1975

"Phone conversation with Joe Smith. He is leaving for Florida this weekend - - getting a divorce, wife is out of town - - will be back the Monday after Easter. Said all books and records will be here.

He also stated that he was reducing his 1974 taxes just as he did his 1973 taxes."

Note of March 20, 1975 - 12:35 P.M.

"Smith called back and told me he did not want me looking at his books at this time, he didn't have time and his personal life has been greatly disrupted. He said we could continue the audit when he gets settled in Fla.

He said since he was going to court anyway to go ahead and write up whatever I'd found. I told him we didn't work that

Above notes concerning re-examination of 1973 records

way that we got explanations before going to court."

Note describing the Audit of petitioner's records for 1973 taxes. Note written on July 9, 1975

"Mr. Smith is very vocal about his discontent with the policies of the U.S. Government. Throughout the examination Mr. Smith would interrupt the audit to bring up a point or argument pertaining to his discontent. Mr. Smith did not intentionally attempt to delay or hinder the audit but his continuous interruption made it difficult to work.

Mr. Smith has a successful lumber dealership in Lewisville. His discontent stems from the fact that he works hard and pays taxes and others on welfare do no work and are given his tax money to live on by the government.

Smith's refusal to answer questions or aid in expiditing the audit caused considerable time to be spent in tracing income and expense items. Smith's answer in response to questions

Note- This report written on July 9, 1975 concerned the audit of petitioner's 1973 tax records. That audit took place in Oct. 1974. Director McCanless wrote Senator Chiles on June 18, 1975. His letter indicated the examination was ongoing at the time petitioner left for Florida.

was 'it's in the books and records'."

Note written August 17, 1975

"Statement of circumstances surrounding the 7712 tax returns of Joe and Doris Smith"

"On 3-19-75 Je Smith, Jr. signed and dated a 1974 tax return prepared by him. This return was prepared as a joint tax return. He presented the return to his wife Doris M. Smith who was supposed to sign the return and mail it to IRS. The Smith's being separated at the time. Mrs. Smith did not sign the return but mailed the return as it was to Austin. The return was processed as a joint return even though it was not signed by both spouces. Mrs. Smith then filed an amended separate return dated April 9, 1975 with a letter stating the prior return of 3-19-75 was an invalid joint return since she had not signed it and that her separate return reported income and expenses in the correct manner." [1]

1 - Refer to IRS letter of June 4, 1976. More than 1 year later, respondent collected on invalid joint return. See App.42, last para.

The purpose of the audit calculations is to determine correct income and expenses and to make adjustments to the two tax returns to make them conform to IRS regulations concerning the filing of married filing separate status.

APPLICABLE CASES

THOMPSON v. UNITED STATES 308 F 2d 634 (1962)

". . . The Internal Revenue Act provides for complete and exclusive relief to taxpayers who feel aggrieved by the rulings of the Commissioner. Thus, it is clear that Congress has provided two, and only two, basic procedures by which a taxpayer may challenge the legality of a tax or an assessment:

(1) he may decline to pay and provided the proper steps are taken, he may have a determination of his problem before collection and payment of the tax. 26 U.S.C. section 6213. This is commonly known as the Tax Court route, the decision in which may be reviewed on the record before the Court of Appeals . . ."

FLAST v. COHEN, 392 U.S. 83 (1968)

FLAST AT 97:

"Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is 'not always clearly distinguished from the constitutional limitation.' Barrows v. Jackson 346 U.S.249, 255 (1953) . . ."

"The 'many subtle pressures' Poe v. Ullman, 367 U.S. 497, 508 (1961) which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours . . ."

FLAST AT 98:

"As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put". According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations compels a rejection of the Government's position."

FLAST AT 99:

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' (Baker v. Carr, 369 U.S. 186,204 (1962)"

FLAST AT 102:

"First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Section 8, of

the Constitution . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Section 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."

FLAST AT 105:

"We have noted that the Establishment clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, Section 8. Whether the Constitution contains other specific limitations can be determined only in the context of

future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."

UNITED STATES v. BUTLER 297 U.S. 1 (1936)

BUTLER AT 66:

"While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the

legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

'The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.'

Again he says:

'A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them.'"

BUTLER AT 83:

(Justice Stone dissenting the first transfer of income scheme of any consequence)

"Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained."

BUTLER AT 85: "It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."

BUTLER AT 87: "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. 'It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Justice Holmes, in . . . . . .

Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent - - expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility."

YANNICELLI v. NASH 354 F.Supp 143 (1973)

YANNICELLI AT 145:

Declaratory Judgment - Where taxpayer was not seeking a premature judicial declaration concerning merits of his federal tax assessment and whether he owed government unpaid taxes, but merely sought a determination of legality of tax lien and levy independent from merits of deficiency assessment, prohibition regarding federal taxes within Declaratory Judgment Act could not be used

to shield Internal Revenue Service from judicial review of alleged constitutional violations resulting from enforcement of tax collection procedures. 28 U.S.C.A. Sections 2201, 2410; 26 U.S.C.A. (I.R.C. 1954) Section 7421."

Internal Revenue - "Provision of Internal Revenue Code that, except as provided, no suit for purpose of restraining assessment or collection of any tax shall be maintained in any court does not prohibit any and all suits to restrain assessment or collection of a tax; such a suit may be maintained if complainant shows existence of special and extraordinary circumstances sufficient to bring case within some acknowledged head of equity and demonstrates that United States cannot establish its tax claim. Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C.A."

YANNICELLI AT 151:

IV (19) Plaintiff's money has already been assessed and collected prior to this suit. Consequently, he seeks to show that the money was unlawfully obtained by the IRS. An examination on the merits is therefore needed for the Court to determine whether under the law and particular facts of the case the Government unlawfully obtained possession of the money in question. This Court has the power to order the return of any unlawfully held property under Rule 41 (e) F.R. Crim.P., and under general principles of equity.

BOTTA V. SCANLON, 288 F 2d 504, 506 (1961)

"Certainly there are other and different 'special and extraordinary' circumstances than a tax imposed under an inapplicable oleomargarine statute. Thus, the injunction of the Fifth Amendment relating to deprivation of property

without due process of law may well be intitled to priority consideration under appropriate circumstances . . ."

FUENTES V. SHEVIN, 407 U.S. 67,80 (1972)
"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual, its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment, to minimize substantively unfair or mistaken deprivations of property."

LINDER V. U.S. 268 U.S. 5, 17
"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established dictrine that any provision of

an act of Congress ostensibly enacted under the power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something within power reserved to the States (or petitioner in this case) is invalid and cannot be enforced."

UNITED STATES v. KAHRIGER 345 U.S. 22 (1953)
(Justice Frankfurter, dissenting)

" . . . However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.

Concededly the constitutional questions

presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach to the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in Child Labor Tax Case, supra, offer an easy way for the legislative imagination to control 'any one of the great number of subjects of public interest' . . ."

". . . The motive of congressional legislation is not for our scrutiny, provided only that the ulterior purpose is not expressed in ways which negate what the revenue words on their face express and which do not seek enforcement of the formal revenue purpose through means that offend those standards of decency in our civilization against which due process is a barrier."

26 U.S.C. section 6402:

(a) General rule - In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

Notes of Decisions

6. Discretion of Commissioner -

". . . Section 322 (I.R.C. 1939) providing that where there has been overpayment of tax, amount of overpayment shall be credited against income tax or installment thereof then due from taxpayer . . ."

10. Credits - Application of -

The overpayment of income taxes was properly credited against distilled spirits tax assessed against taxpayer, in absence of proof that such assessment was erroneous. Kjar v. U.S. 69 F.Supp.406,108 (1947)

26U.S.C. section 6512:

(a) Effect of Petition to Tax Court: If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency under

section 6212(a) (relating to deficiencies of income tax . . .) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), no credit of refund on income tax for the same taxable year . . . in respect of which the Secretary of his delegate has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court . . ."

26 U.S.C. section 7605:

(b) Restrictions on Examination of Taxpayer - "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

ROWR form 471-B

DEPARTMENT OF THE TREASURY-INTERNAL REVENUE
NOTICE OF FEDERAL TAXES DUE

Chicago Title Co.
1001 S.W. 5th Ave., #120
Portland, OR 97204

Escrow Officer
Al Gloeckner

You are hereby notified that there is now due, owing, and unpaid from:

Joseph W. Smith, Jr.

To the United States of America, the sum of:

$2,566.54

For internal revenue taxes secured by a lien pursuant to sections 6321 and 6322, or the estate tax lien arising under section 6324, Internal Revenue Code, from the date of each assessment.

Kind of tax	Identifying Number	Date of Assessment
1040/12-31-73	454-36-4031N	04-09-79
1040/12-31-74	454-36-4031N	04-07-79

Unpaid Balance of Assessment	Interest	Total
$1,677.19	$104.10	$1,781.29
527.71	257.54	785.25

Additional interest will be charged after 10-29-80 at $.64 a day.

Additional late payment penalty of $N/A will be charged on and on the day of each month thereafter until

Dated at Portland, OR this 29th day of October 1980

A certificate of release of Federal tax lien will be filed immediately only if payment is by:

(1) Cash;
(2) Certified or cashier's check;
(3) Treasurer's check drawn on a national or state bank or trust company; or
(4) United States postal, bank, qualified building and loan association, express, or telegraph money order.

If payment is in some other form, such as personal check, the release will be delayed for 60 days, or until evidence is furnished that the funds have been transferred.

Caution to Fiduciaries: For personal liability for failure to honor priority of debts due the United States, see sections 3466 and 3467 of the revised statutes (31 U.S.C. 191, 192.)

Please make payment payable to Internal Revenue Service and send it to:

Internal Revenue Service
P.O. Box 4451
Portland, OR 97208

District Director of Internal Revenue
Ralph B. Short

By (signature)
BILL MANDERFELD
Revenue Officer

Telephone Number
(503) 221-3942